G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: SHABA Contracting

File: B-287430

Date: June 18, 2001

Hadley H. Gross for the protester.
Lynn W. Flanagan., Esq., Department of Agriculture, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency properly determined tree thinning services were a commercial item and used Federal Acquisition Regulation subpart 12.6, Streamlined Procedures for Evaluation and Solicitation for Commercial Items, to acquire the services.

DECISION

SHABA Contracting protests the terms of request for proposals (RFP) No. RMAST-01-047, issued by the Forest Service, United States Department of Agriculture, for tree thinning services.

We deny the protest.

The RFP was issued as a combined synopsis/solicitation posted in the Commerce Business Daily Online (CBD*Net*) on February 28, 2001, pursuant to Federal Acquisition Regulation (FAR) subpart 12.6, Streamlined Procedures for Evaluation and Solicitation for Commercial Items.[1] Proposals were sought to perform tree thinning in five designated areas in the Black Hills National Forest, South Dakota. The RFP stated that the provisions, and clauses incorporated in the RFP were those "in effect through Federal Acquisition Circular 97-23." The notice further advised that a copy of the applicable Forest Service specifications, supplemental instructions, and map locations of the areas could be obtained from the Forest

[1] These procedures are intended to simplify the process of acquiring commercial items.

Service and identified the applicable clauses and instructions.[2] The notice also identified the applicable Service Contract Act wage determination. Price was said to be the only evaluation factor.

SHABA timely protested that the synopsis "actually [is] for services instead of commercial items" and argues that different clauses were required than those listed in the notice. SHABA also complains that the notice improperly failed to incorporate certain required clauses.

Contrary to SHABA's apparent belief, services can be commercial items. In this regard, FAR § 2.101 states that services are commercial items if they are:

> Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.

Determining whether a particular service is a commercial item is a determination largely within the agency's discretion, which will not be disturbed by our Office, unless it is shown to be unreasonable. Crescent Helicopters, B-284706 et al., May 30, 2000, 2000 CPD ¶ 90 at 2. Agencies are required to conduct market research pursuant to FAR part 10 to determine whether commercial items are available that could meet the agency's requirements. FAR § 12.101(a). If through market research the agency determines that the government's needs can be met by an item customarily available in the commercial marketplace that meets the FAR § 2.101 definition of a commercial item, the agency is required to use the procedures in FAR part 12 to solicit and award any resultant contract.[3] FAR §§ 10.002(d)(1), 12.102(a).

Here, the record shows that the Forest Service concluded, based upon an informal market survey, that these tree thinning services qualify as a commercial item

---

[2] The clauses from the FAR identified in the notice were section 52.212-1, Instructions to Offerors--Commercial Items; section 52.212-2, Evaluation—Commercial Items; section 52.212-3, Offeror Representations and Certifications--Commercial Items; section 52.212-4, Contract Terms and Conditions—Commercial Items; and selected clauses from section 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items. In addition, the notice incorporated clauses concerning insurance coverage, work on a government installation, progress reporting, and value engineering.

[3] According to FAR § 10.002(b), the degree of market research depends on the circumstances involved in each situation, but should include determining whether the items are customarily available in the commercial marketplace. FAR § 10.002(b)(1)(i).

because the services are not unique, are not used exclusively by the government, and are offered and sold competitively by forestry and nursery firms. For example, the Forest Service reports that there were more than 150 potential offerors on the mailing list for the services, that the local telephone book contained numerous sources for tree thinning services, and that the agency has personal knowledge of several commercial companies engaged in various types of tree services. SHABA does not dispute any of these findings. Thus, there is no basis to object to the agency's determination that these services constituted a commercial item and were required to be solicited under FAR part 12.

Although SHABA questions the Forest Service's motivations for using a different procurement strategy than it previously used in acquiring these services, including the omission of certain clauses, FAR subpart 12 permits the agency to utilize the streamlined procedures contained in subpart 12.6 to solicit commercial items. This subpart supplants the normal solicitation process and requires only those clauses specified in the subpart to be incorporated in the combined synopsis/solicitation notice. Since the notice included the clauses required by FAR subpart 12.6, there is no merit to SHABA's contentions that the notice did not identify the appropriate clauses and that the Forest Service was trying to avoid applicable regulations.

SHABA notes several clauses that it asserts were improperly omitted from the solicitation, including a clause entitled "Alien Employees," which at one time was included in the Forest Service Acquisition Regulation (FSAR); FAR § 52.236-7,"Permits and Responsibilities;" and Agricultural Acquisition Regulation § 452.236-72, "Use of Premises." The agency advises that the "Alien Employees" clause is no longer included in the FSAR, and that the other two clauses are generally for use in construction contracts and are not required to be used in tree thinning services contracts. SHABA has not rebutted the agency's position and we find no basis to find these clauses were required to be included in the solicitation.[4]

SHABA finally claims that the awards under this solicitation will be to firms who can and will propose a very low price because they will not comply with labor and other laws. These issues are not for our consideration, even if they were not premature and speculative. A protester's claim that a bidder or offeror submitted an

---

[4] The Forest Service reports that certain other clauses that the protester asserts should have been included in the solicitation, covering such things as employment of eligible workers, labor standards for contracts involving migrant and agricultural workers, and migrant and seasonal agricultural worker protection act registration were added by amendment 2 to the solicitation. Thus, the protest that these clauses should have been included in the solicitation is academic and will not be considered.

unreasonably low price--or even that the price is below the cost of performance--is not a valid basis for protest. An offeror, in its business judgment, properly may decide to submit a price that is extremely low. Brewer-Taylor Assocs., B-277845, Oct. 30, 1997, 97-2 CPD ¶124 at 4. An agency decision that the contractor can perform the contract at the offered price is an affirmative determination of responsibility, which we will not review absent a showing of possible bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may not have been met. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2001). Where, as here, there is no such showing, we have no basis to review the protest.[5] Moreover, an allegation that a contractor will engage in illegal practices after award of the contract is a question of contract administration, which is the responsibility of the procuring agency and other cognizant federal agencies, such as the DOL, and which cannot be reviewed by our Office under our bid protest function. Bid Protest Regulations, 4 C.F.R. § 21.5(a)(2); see Galveston Aviation Weather Partnership, B-252014.2, May 5, 1993, 93-1 CPD ¶ 370 at 2.[6]

The protest is denied.

Anthony H. Gamboa
General Counsel

---

[5] In fact, we understand that SHABA proposed extremely low prices in response to this solicitation, and the agency, suspecting that SHABA may have made mistakes, has requested SHABA to verify its prices.

[6] SHABA also asserted that the wrong wage determination was included in the solicitation. By amendment 3, the Forest Service included a more recent wage determination that included the brush/precommercial thinning rate requested by SHABA in its protest. Thus, this protest issue is academic and will not be considered further.